STATE OF RHODE ISLAND

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: October 6, 2022)

CARL I. BOMAR and BETHANY BOMAR, ***Appellants,***	:	
v.	:	**C.A. No. PC-2020-07835**
THE GLOCESTER ZONING BOARD OF REVIEW and its MEMBERS; ADAM MUCCINO, In His Official Capacity as the Director of Finance and TOWN TREASURER FOR THE TOWN OF GLOCESTER; KIMBALL W. BURGESS, BARBARA BURGESS-MAIER, in their Capacity as the original owners/applicants; and MICHAEL BARNES and SUSAN BARNES, in their Capacity as the Applicants, ***Appellees.***	:	

DECISION

REKAS SLOAN, J. Carl I. Bomar and Bethany Bomar (Appellants) appeal a September 24, 2020 decision (Decision) of the Town of Glocester Zoning Board of Review (Zoning Board) which granted dimensional relief. Jurisdiction is pursuant to G.L. 1956 § 45-24-69. For the reasons set forth herein, this Court affirms the Decision of the Zoning Board.

I

Facts and Travel

On July 18, 2020, Kimball W. Burgess and Barbara Burgess-Maier owned an undeveloped lot located at 0 Old Quarry Road, Recorded Plat PI, Lot 15 in Glocester (Property). (R. at 95.)[1]

[1] Citations to the "Record" will be a reference to the Amended and Restated Record filed in the Court portal on September 30, 2022 and which was stipulated by all parties to be the complete record on appeal. The Court notes with appreciation the refiling of the Record with Bates stamp numbering to make it easier for the Court. Thus, a cite to "R. at 95" will be a reference to bates numbered page 000095.

Michael Barnes and Susan Barnes intended to purchase the Property and construct a single-family house to use as a residence once they retired. (R. at 95-99.) Kimball W. Burgess, Barbara Burgess-Maier, Michael Barnes, and Susan Barnes (collectively, Applicants)[2] filed an Application for Dimensional Relief (Application) with the Zoning Board. (R. at 114-119.) In the challenged Decision, the Zoning Board granted Applicants dimensional variances under § 45-24-41 for the construction of a single-family house on the Property. (R. at 95-99.) As abutting neighbors to the north of the Property, Appellants objected to the proposed dimensional variances and now appeal the Zoning Board's Decision. (Compl. 1-2.)

The Applicants sought to construct a two-bedroom house with a 1,624 square foot "building envelop" or footprint on the Property. (R. at 117.) The house would be served by an individual well and a separate individual septic system, for which Applicants had already received approval from the Rhode Island Department of Environmental Management (DEM). *Id.* Due to the proposed location of the house, Applicants requested two separate dimensional variances: 1) a deviation from the minimum side yard width of thirty-five feet to allow a side yard width of eighteen feet, and 2) a deviation from the minimum rear yard depth of one hundred feet to allow a rear yard depth of sixty feet.[3] (R. at 118.) The Applicants stated that the deviations were necessary

[2] Applicants represent that the Barnes family acquired title to the Property on February 4, 2022. (Mem. Law Supp. Kimball W. Burgess, Barbara Burgess-Maier, and Michael & Susan Barnes (Def./Appellees) Obj. Pl./Appellants' Mot. Vacate Zoning Decision and Req. for Remand 3 n. 2.) Thus, the Court will continue to refer to all four individuals as Applicants in the aggregate; however, due to the completed sale of the Property to Michael and Susan Barnes, Kimball W. Burgess and Barbara Burgess-Maier were dismissed from this action on March 22, 2022 by stipulation of the parties. *See* Stip. Dismissal Defs./Appellees Kimball W. Burgess and Barbara Burgess-Maier.

[3] The Property is located in an A-3 Agricultural Residential zone, which requires a fifty foot side yard width; however, because the Property was a legal conforming lot at the time it was platted in an A-2 zone, the thirty-five foot side yard width applies. *See* R. at 113.

due to the presence on the Property of "wetlands, ledge, and unique features that limit the location of the proposed dwelling." *Id.* After reviewing the Application, the Applicants' testimony at an August 4, 2020 Planning Board meeting, and a drawing provided by the Applicants, the Glocester Planning Board made a positive recommendation to the Zoning Board and found that granting the dimensional variances would not be inconsistent with the Glocester Comprehensive Community Plan. (R. at 113.)

At the September 24, 2020 Zoning Board meeting, the Applicants presented testimony from four expert witnesses. (R. at 20 (Tr. 5:7-19).)[4] Anthony Muscatelli (Muscatelli), a land surveyor, testified that he was hired by Applicants to survey the Property. (R. at 24-25 (Tr. 9:13-10:19).) As such, Muscatelli was involved in "creat[ing] the location" of the proposed house and testified as to how that location was influenced by the physical characteristics of the Property. (R. at 26-28 (Tr. 11:4-13:7).) According to Muscatelli, he examined the possibility of locating the house on the "lower portion" of the Property near Old Quarry Road, but the presence of wetlands, ledge, a required setback from a drain pipe in the road, as well as the required buffer from an existing well for a neighbor to the south, meant that an attempt to place a house and septic system there would have "very, very, very little chances" of receiving DEM approval. (R. at 28-29 (Tr. 13:8-14:17).) Muscatelli opined that while it was "very tight and difficult" to fit the house in the proposed location "between the ledge, the water and the northerly boundary line[,]" that area "was the most logical location for the house." (R. at 27-28 (Tr. 12:17-13:7).) Muscatelli also stated that

[4] Citations to the Record are to the bates numbered pages. To avoid confusion, any citations to the Transcript of the September 24, 2020 Zoning Board meeting, which starts on bates numbered page 15 and goes to bates numbered page 95, will refer first to the bates stamped page, followed by "(Tr.)" followed by the page within the transcript (as numbered by Allied Court Reporters, Inc.) and the lines within that page of the transcript. For example, a cite to "(R. at 20 (Tr. 5:7-19))" is a reference to bates page 20 of the entire record, which is the September 24, 2020 transcript at page number 5 (as numbered by Allied Court Reporters), lines 7-19.

while he had "worked with several" potential footprints for the house, the proposed footprint in the Application was the largest "that can be located and amenable to the client."[5] (R. at 27 (Tr. 12:3-11).)

Next, Applicants presented expert testimony from Norbert Therien (Therien), a land surveyor, "septic system designer," and "soil and site evaluator" hired by Michael and Susan Barnes to determine if a single-family residence could be built on the Property. (R. at 32-33 (Tr. 17:17-18:17).) After noting the multiple challenges posed by the wetlands and ledge on the Property, including the difficulty of obtaining DEM approval for the planned location of the house's septic system, Therien opined that the proposed location of the house "is the best location to develop this particular piece of property[.]" (R. at 33-36 (Tr. 18:17-21:12).) Therien also noted that the Applicants had originally obtained DEM approval for a house that was closer to the Property's northern boundary line before obtaining a second approval for the resubmitted Application. (R. at 35 (Tr. 20:8-22).) Through that revision, the Applicants moved the planned footprint of the house farther away from the boundary line, to a distance of eighteen feet, which simultaneously reduced the side-yard dimensional relief requested to seventeen feet. (R. at 35 (Tr. 20:8-16)); *see* R. at 182 (Muscatelli survey).

Applicants' third expert witness, Scott Rabideau (Rabideau), is a wetland scientist who performed a "wetland delineation" on the Property and helped Applicants obtain a DEM permit to alter freshwater wetlands. (R. at 40-41 (Tr. 25:5-6, 25:21-26:2).) Rabideau spoke to the process of obtaining the DEM permit and reiterated that the front of the Property near Old Quarry Road

[5] Applicants' attorney later stated that the proposed footprint was in fact not the maximum footprint that Applicants could have proposed because another design referenced by Appellants' counsel had the Applicants' proposed dwelling twelve feet from the side yard (i.e. *closer* to the objecting neighbors/Appellants) rather than the eighteen feet that they are currently seeking (i.e. *further* from the objecting neighbors/Appellants). (R. at 78-79 (Tr. 63:21-64:5).)

was not a suitable location for a septic system. (R. at 42 (Tr. 27:3-22).) Rabideau opined that Applicants' plan was the "most reasonable alternative for development of the lot under the Freshwater Wetland Program rules" because the plan "maintained the integrity of the 50 foot perimeter wetland in its entirety, . . . with the exception of about 110 square feet." (R. at 43 (Tr. 28:6-17).) On the issue of Applicants' decision to move the house farther away from the property line, Rabideau stated that Applicants "were able to reorient the house in such a way to gain more distance from the property line" while still maintaining "10 feet of separation distance from the 50 foot perimeter wetland or their buffer zone and the nearest corner of the house[.]" (R. at 44 (Tr. 29:3-15).) As a result, Applicants were able to quickly obtain a permit modification from the DEM because the relocation took place within the "approved limit of disturbance[.]" (R. at 44 (Tr. 29:15-19).)

Applicants' fourth and final expert witness was Thomas Sweeney (Sweeney), a real estate broker and appraiser engaged by Applicants to opine on what impact the proposed development would have on surrounding properties. (R. at 47 (Tr. 32:16-20).) Sweeney opined that the planned single-family house was a well-designed project that was consistent with and complementary to other single-family properties in the area and would have no negative impact on surrounding property values. (R. at 49 (Tr. 34:17-22).) Sweeney also opined that, based on his own observations of the Property and the opinions of the other expert witnesses, the proposed location appeared to be the "only place that you could . . . develop a permitted use" on the Property. (R. at 48 (Tr. 33:19-24).)

Applicants Michael and Susan Barnes testified that they hope to build a house on the Property so that they could retire in Glocester, where Michael worked as the superintendent of the Foster-Glocester Regional School District. (R. at 52-53 (Tr. 37:7-38:15).) Michael Barnes also

testified that when he and Susan first became involved with the Property, DEM had already approved the plan which placed the house twelve feet from the property line of the objecting neighbors/Appellants. (R. at 53-54 (Tr. 38:23-39:5).) Michael and Susan Barnes met and spoke with Appellants, who expressed concern about the closeness of the proposed home to their property so the Applicants "recontract[ed] with Mr. Muscatelli and Mr. Rabideau to try to reposition the home," and were able to "change the shape and location and the house was moved from 12 feet from the property line to 18 feet from the property line, in an attempt to be the best possible neighbors … and to minimize the impact it would have on our – what we hope to be, neighbors, for years to come[.]" (R. at 54 (Tr. 39:5-16).) The Zoning Board also acknowledged receipt of an August 7, 2020 letter from the Harmony Fire Department (R. at 174), a September 23, 2020 revised DEM permit (R. at 175-181), written reports from expert witnesses Rabideau (R. at 120-149) and Sweeney (R. at 151-161), and two sets of plans submitted by Muscatelli (R. at 169-170; 182). (R. at 55-56 (Tr. 40:8-41:4).)

The Zoning Board then heard from Appellants' attorney, who began by stating that Appellants did not seek to completely foreclose the Applicants from building a house on the Property, only to enforce the legal requirement that any dimensional relief granted was the least relief necessary. (R. at 58 (Tr. 43:14-24).) Appellants' attorney then directed the Zoning Board's attention to a document from the application file depicting a 1,056 square foot floor plan with the notation "alternate plan . . . needs no relief[,]" and contended that this document was evidence of an "alternate house design" that "did not require any dimensional relief[.]"[6] (R. at 58-59 (Tr. 43:3-7; 44:1-6).) This "alternate design" was an odd shape with the house being only eight feet on the

[6] Applicants' attorney later responded by stating that "the other design that was talked of by Ms. Bomar's counsel required a variance of 23 feet, 6 inches, and that was 12 feet from the property line, not what the applicant has proposed." (R. at 79 (Tr. 64:1-5).)

east side graduating to twenty-six feet on the west side. *See* R. at 1-2. Appellants' attorney suggested that the Zoning Board ask Applicants' expert witnesses if any of their opinions would change if the alternative design was used and argued that if their answer was no, Applicants' plan was not the least relief necessary; however, the Zoning Board opted not to pose any further questions to Applicants' experts. (R. at 59 (Tr. 44:9-20).)

Appellant Bethany Bomar then shared her concerns that, due to the proximity of the planned location to her house and the relative elevation of the Property, Applicants' proposed house would overlook her own residence as well as her recreation area on Waterman Lake. (R. at 62-63 (Tr. 47:10-48:10).) She also testified that she built her own home in 1998 based in part on her understanding that there would never be a house in the area where the Applicants are proposing to build a house. (R. at 61-62 (Tr. 46:23-47:10).) In response to a question from the Zoning Board regarding the effects of the "alternate plan" that her attorney introduced, Bethany Bomar admitted that she would still have the same concerns but would prefer that Applicants' house be set back from her residence as much as possible. (R. at 64-66 (Tr. 49:11-51:4).)

The Zoning Board then heard from several members of the public. Keith Heroux (Heroux) stated that he lived several lots down from the Property and questioned why the proposed house could not have a smaller footprint to conform with the setback requirements. (R. at 68-69 (Tr. 53:1-54:1).) While not speaking as an expert witness, Heroux stated that he was a licensed real estate attorney and broker in both Rhode Island and Massachusetts and opined that the addition of a nearby house would negatively affect the value of the Appellants' property. (R. at 69 (Tr. 54:3-22).) Barbara Powers (Powers), a long-time resident of the area, testified that she always believed that the proposed location could not be developed because of the wetlands on the Property. (R. at 70-71 (Tr. 55:19-56:7).) Powers was also concerned with what she perceived as the Zoning

Board's tendency to grant variances on a regular basis and the resulting changes to the general character of the area. (R. at 71-72 (Tr. 56:8-57:6).) Liz Viall, another area resident, stated that she shared Powers' concerns and worried that granting the dimensional variance would set a precedent for future development. (R. at 74 (Tr. 59:3-21).)

Finally, the Zoning Board heard from Applicant Barbara Burgess-Maier (Burgess-Maier), who at that time was one of the owners of the Property. Burgess-Maier stated that her mother had originally plotted and divided the Property in the 1970s and disputed Bethany Bomar's contention that the Property was meant to stay undeveloped in perpetuity. (R. at 75 (Tr. 60:21-61:17).) Burgess-Maier also expressed her hope that the Zoning Board would grant the variance and stated that the proposed design of the house had been "shrunk down to . . . [a] two bedroom house from what would have been a three bedroom house, in order to conform and appreciate the land and the environmental impact." (R. at 77-78 (Tr. 62:22-63:9).)

At the conclusion of the meeting, the Zoning Board voted unanimously to grant the requested relief. (R. at 83 (Tr. 68:2-3).) In the subsequent written Decision, the Zoning Board found that the Applicants' hardship was due to the unique characteristics of the land and not any physical or economic disability of the Applicants, as "[a]ll of the applicants' witnesses testified credibly that the proposed location was the only location on the lot which would conform to DEM wetland regulations and would not be impacted by the ledge that exists on and under the property." (R. at 97.) Next, based on the Zoning Board members' individual knowledge of the area and Sweeney's expert testimony, the Zoning Board found that the requested variance would not alter the general characteristics of the surrounding area. (R. at 98.) The Zoning Board also found that the hardship was not the result of any prior action of the Applicants and did not result primarily

from the desire of the Applicants to realize financial gain, as the Applicants intended to purchase the Property "as it was originally proposed and accepted by town authorities." *Id.*

Finally, the Zoning Board found that the relief requested was the least relief necessary and that denial of the variance would amount to more than a mere inconvenience. *Id.* The Zoning Board noted that applicants had already "reconfigured the footprint to a location that was six feet further away from the [Appellants'] property line," and that expert witnesses Rabideau, Therien, and Muscatelli all "testified credibly that [the] proposed footprint could not be sited any further away from the boundary line because of the physical constraints" of the ledge and wetlands on the Property. *Id.* While the Zoning Board acknowledged the alternative design advanced by Appellants, that design was "notably a smaller footprint, 1,056 square feet as opposed to the current proposal of 1,464 square feet[,]" and "include[d] a very odd shaped footprint with an illogical design of one end of the structure tapering to eight feet." (R. at 99.) The Zoning Board also noted that there was no evidence "that this older plan was ever submitted to DEM for septic system or wetlands approval[,]" and concluded that the alternative design was "not a viable alternative" to the Application. *Id.* Accordingly, the Zoning Board found that the Application "involve[d] the least relief necessary under the circumstances." *Id.*

On November 10, 2020, Appellants filed a timely appeal of the Decision to this Court. (Compl. 1); *see* § 45-24-69(a). In Count I of the Complaint, Appellants ask the Court to review and reverse the Zoning Board's Decision pursuant to § 45-24-69(d). (Compl. 3-4.) In Count II, Appellants ask the Court to issue a stay pending appeal pursuant to § 45-24-69(a); however, Appellants have not moved for a stay. (Compl. 4-5.)

On December 6, 2021, Appellants filed a Motion to Vacate and Remand the Decision. (Pls./Appellants Mot. to Vacate Zoning Decision and Remand the Same for Further Proceedings

(Pls.' Mot. to Vacate and Remand) 1-2.) Defendants—namely, the Zoning Board and its Members and Adam Muccino in his Official Capacity as the Director of Finance and Town Treasurer for the Town of Glocester (collectively, Glocester Defendants), together with Applicants—have filed Objections to Appellants' Motion. *See* Mem. Law Supp. Kimball W. Burgess, Barbara Burgess-Maier, and Michael & Susan Barnes (Def./Appellees) Obj. to Pl./Appellants' Mot. Vacate Zoning Decision and Req. for Remand (Applicants' Mem.) 1; Defs. Glocester Zoning Board and its Members, and Adam Muccino, Director of Finance, and Glocester Town Treasurer, Mem. in Supp. Obj. to Pls.' Mot. Vacate and Req. Remand Decision of Glocester Zoning Board (Glocester Defs.' Mem.) 1.)

II

Standard of Review

Superior Court review of zoning board decisions is governed by § 45-24-69(d), which provides:

> "The court shall not substitute its judgment for that of the zoning board of review as to the weight of the evidence on questions of fact. The court may affirm the decision of the zoning board of review or remand the case for further proceedings, or may reverse or modify the decision if substantial rights of the appellant have been prejudiced because of findings, inferences, conclusions, or decisions which are:
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> "(1) In violation of constitutional, statutory, or ordinance provisions;
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> "(2) In excess of the authority granted to the zoning board of review by statute or ordinance;
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> "(3) Made upon unlawful procedure;
>
> "(4) Affected by other error of law;
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> "(5) Clearly erroneous in view of the reliable, probative, and substantial evidence of the whole record; or

> "(6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." Section 45-24-69(d).

In reviewing the decision of a zoning board, "[i]t is the function of the Superior Court to 'examine the whole record to determine whether the findings of the zoning board were supported by substantial evidence.'" *Lloyd v. Zoning Board of Review for City of Newport*, 62 A.3d 1078, 1083 (R.I. 2013) (quoting *Apostolou v. Genovesi*, 120 R.I. 501, 507, 388 A.2d 821, 824 (1978)). Substantial evidence is defined as '"such relevant evidence that a reasonable mind might accept as adequate to support a conclusion, and means an amount more than a scintilla but less than a preponderance."' *New Castle Realty Co. v. Dreczko (New Castle)*, 248 A.3d 638, 643 (R.I. 2021) (quoting *Iadevaia v. Town of Scituate Zoning Board of Review*, 80 A.3d 864, 870 (R.I. 2013)). This deference to a zoning board's factual determinations "is due, in part, to the principle that 'a zoning board of review is presumed to have knowledge concerning those matters which are related to an effective administration of the zoning ordinance.'" *Pawtucket Transfer Operations, LLC v. City of Pawtucket*, 944 A.2d 855, 859 (R.I. 2008) (quoting *Monforte v. Zoning Board of Review of East Providence*, 93 R.I. 447, 449, 176 A.2d 726, 728 (1962)). Questions of law are subject to *de novo* review, as "a zoning board's determinations of law, like those of an administrative agency, 'are not binding on the reviewing court'" and "'may be reviewed to determine what the law is and its applicability to the facts.'" *Id.* (quoting *Gott v. Norberg*, 417 A.2d 1352, 1361 (R.I. 1980)).

If the Court finds that the zoning "board's decision was supported by substantial evidence in the whole record," then the zoning board's decision must stand. *Lloyd*, 62 A.3d at 1083. However, if the decision of the board does not contain sufficient findings of fact and conclusions of law for our Court to adequately review the decision, the Court will remand the matter to the board so that the board may issue a ruling that is complete and susceptible to judicial review. *See*

Irish Partnership v. Rommel, 518 A.2d 356, 359 (R.I. 1986) (returning matter to the zoning board of review).

III

Analysis

Appellants argue that the evidence in the record clearly and unequivocally demonstrates that the dimensional relief requested by the Applicants was not "the least relief necessary" under § 45-24-41(d)(4). (Pls./Appellants' Mem. in Supp. of Mot. Vacate and Remand (Pls.' Mem.) 1-2, 5.) Specifically, Appellants contend that the Zoning Board ignored uncontroverted evidence in the record—namely, an alternative design of a house with a footprint of 1,054 square feet (the Alternative Footprint)[7]—showing that a single-family house could be built on the Property without the need for dimensional relief. *Id.* at 5. Noting that the burden of proof before the Zoning Board rested on the Applicants, Appellants argue that the Zoning Board failed to perform a meaningful review of the Alternative Footprint and should have required the Applicants to present evidence showing that the Alternative Footprint design was not a reasonable alternative. *Id.* at 6-8. Noting that the Zoning Board did not question Applicants' expert witnesses as to whether the Alternative Footprint represented the least relief necessary, Appellants argue that the Zoning Board improperly placed the burden on Appellants to demonstrate that the Alternative Footprint design was a viable option. *Id.* at 6, 9.

[7] Appellants note that the file also contained an additional alternative design in the form of a drawing from 1972 showing a house near the front of the Property, i.e. near Old Quarry Road; however, Appellants concede that testimony from the Applicants' experts demonstrated that this alternative site was not feasible due to the presence of wetlands at that location. (Pls.' Mem. 5.)

In response, the Applicants argue that the Zoning Board's Decision was based on substantial, legally competent evidence.[8] (Applicants' Mem. 8-9.) In particular, the Applicants contend that the Zoning Board supported each element of the statutorily required dimensional variance analysis with express findings of fact after considering the credible and unrebutted testimony of the Applicants' four expert witnesses. *Id.* at 9-11. Next, the Applicants argue that the Zoning Board was not required to consider the Alternative Footprint design because that design, an unauthenticated and unsigned sketch of a "polygon with associated dimensions," was not legally competent evidence. *Id.* at 1, 12. The Applicants also point out that the Zoning Board did in fact consider the Alternative Footprint but properly declined to accept the design as a viable alternative to the Application due to the Alternative Footprint's obvious shortcomings. *Id.* at 11-12. Finally, the Applicants argue that zoning boards are not required to consider other permitted uses, including uses that require no relief whatsoever, when ruling on a request for a dimensional variance. *Id.* at 13 (citing *Westminster Corp. v. Zoning Board of Review of City of Providence*, 103 R.I. 381, 238 A.2d 353 (1968)). The Applicants conclude that the Alternative Footprint is irrelevant and that the Decision should be upheld because the record contains sufficient evidence to satisfy every element of the dimensional variance standard. (Applicants' Mem. 15.)

In granting a dimensional variance, a zoning board must find that an applicant satisfied the requirements of §§ 45-24-41(d)(1-4) and (e)(2). *See* § 45-24-41(d)(1)-(4). Section 45-24-41 governs dimensional variances. The applicants have the burden of proof and must present evidence to the zoning board of review demonstrating the following:

> "(1) That the hardship from which the applicant seeks relief is due to the unique characteristics of the subject land or structure and not to the general characteristics of the surrounding area; and is not due

[8] In a separate filing, the Zoning Board objected to Appellants' Motion and adopted all the points and authorities in Applicants' Memorandum of Law by reference. (Glocester Defs.' Mem. 1.)

> to a physical or economic disability of the applicant, excepting those physical disabilities addressed in § 45-24-30(a)(16);
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> "(2) That the hardship is not the result of any prior action of the applicant and does not result primarily from the desire of the applicant to realize greater financial gain;
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> "(3) That the granting of the requested variance will not alter the general character of the surrounding area or impair the intent or purpose of the zoning ordinance or the comprehensive plan upon which the ordinance is based; and
>
> "(4) That the relief to be granted is the least relief necessary." Section 45-24-41(d).

Additionally, § 45-24-41(e)(2) requires the applicant to submit evidence showing that "the hardship suffered by the owner of the subject property if the dimensional variance is not granted amounts to more than a mere inconvenience." Section 45-24-41(e)(2); *Lischio v. Zoning Board of Review of Town of North Kingstown*, 818 A.2d 685, 691 (R.I. 2003). In *Lischio*, our Supreme Court held that "more than a mere inconvenience" "means that there is no other reasonable alternative to enjoy a legally permitted beneficial use of one's property." *Lischio*, 818 A.2d at 691.

New Castle, cited *supra*, represents our Supreme Court's most recent application of § 45-24-41, including the least relief necessary standard of § 45-24-41(d)(4), to a request for a dimensional variance. In *New Castle*, an applicant hoping to build a house and septic system on a "preexisting nonconforming lot[,]" which "consisted predominantly of wooded swamp with only a relatively small corner suitable for building[,]" sought dimensional relief from the "front- and side-yard" setback requirements of the local zoning ordinance. *New Castle*, 248 A.3d at 640, 648. In essence, the applicant argued that dimensional relief was warranted because the presence of freshwater wetlands on the subject parcel made it difficult to site and obtain DEM approval for the "proposed 22x32 three-bedroom structure" and accompanying septic system. *The New Castle Realty Co. v. Dreczko, Jr.*, No. WC-2015-0161, 2018 WL 325033, at *1-*2 (R.I. Super. Jan. 3,

2018) ("[Applicant's witness] testified at the hearing that the siting of the septic system is the most critical aspect of the application in order to locate it as far away as possible from the wetlands.") Although the zoning board's decision to deny the dimensional variance was apparently not a model of clarity, the zoning board did reference multiple elements of § 45-24-41 through findings that the applicant's claimed hardship was "self-created[,]" that "the proposed placement of the house on the lot would 'alter the general character of the surrounding area[,]'" and that the requested relief was *not* the least relief necessary. *New Castle*, 248 A.3d at 642, 648, 649 n.6 (quoting § 45-24-41(d)(3)).

After the applicant appealed the denial of dimensional relief to the Superior Court, a trial justice affirmed the denial after finding that the zoning board's conclusion that "the requested relief [did] not reflect the least relief necessary. . . was supported by the substantial evidence on the record and was not an abuse of discretion or clearly erroneous." *The New Castle Realty Co.*, 2018 WL 325033, at *11. The substantial evidence in question consisted of testimony establishing the applicant's "unwillingness to 'consider suggestions about moving the dwelling further away from the wetland by reducing the size'" of the house. *Id.* (quoting hearing transcript); *see New Castle*, 248 A.3d at 648 ("In his decision, [the trial justice] adverted to a board member's statement that [the applicant] was unwilling 'to consider suggestions of trying to move the house further back, further away from the wetlands by making it smaller or by just making it a two-bedroom house.'") The trial justice also found it significant that this "recalcitrance" was largely founded on the applicant's belief that a smaller, two-bedroom house would not be as attractive to potential buyers. *New Castle*, 248 A.3d at 648; *see The New Castle Realty Co.*, 2018 WL 325033, at *11 (citations omitted) ("The marketability and value to a potential buyer of this dwelling are simply not grounds for relief in the granting of a dimensional variance."); *cf.* § 45-24-41(e)(2) ("The fact that a use

may be more profitable or that a structure may be more valuable after the relief is granted is not grounds for relief."). After granting the applicant's petition for writ of certiorari, the Supreme Court, "satisfied that the trial justice's ruling that [the applicant]'s requested relief [did] not reflect the least relief necessary [was] supported by substantial evidence[,]" affirmed the trial justice's decision to uphold the board's denial of a dimensional variance. *New Castle,* 248 A.3d at 648-49.

The instant appeal, which involves Applicants' request for dimensional variances from setback requirements so that they can build a house and septic system on the Property which contains substantial wetland areas, presents a factual landscape that resembles *New Castle* in several respects. The crucial difference however is that this Court is now tasked with reviewing the Zoning Board's Decision to *grant* the requested dimensional relief. *See Lloyd,* 62 A.3d at 1083 (quoting *Apostolou,* 120 R.I. at 509, 388 A.2d at 825) ("[A] trial justice may not 'substitute [his or her] judgment for that of the zoning board if [he or she] can conscientiously find that the board's decision was supported by substantial evidence in the whole record[.]'"); *cf. The New Castle Realty Co.,* 2018 WL 325033, at *11 ("Accordingly, this Court is satisfied that the Board's decision denying New Castle's Petition for dimensional variances was supported by the substantial evidence on the record and was not an abuse of discretion or clearly erroneous.").

After examining the record, this Court is satisfied that the Zoning Board's Decision was supported by substantial evidence. Applicants presented several expert witnesses who testified to the challenges involved in siting the proposed single-family house and associated septic system due to the unique physical characteristics of the Property, including ledge, the northern boundary line, the water, and freshwater wetlands. *See, e.g.,* R. at 27 (Tr. 12:19-24 (Muscatelli testimony)) ("So we tried to fit the house between the ledge, the water and the northerly boundary line and the bottomless sand filter. . . . it was very tight and difficult to fit that house in [those] parameters.");

see also R. at 95-99. Those physical characteristics affected the size, shape, and location of the resulting design, both directly and indirectly through the need to obtain DEM approval for the plans based on the presence of the wetland areas. *See* R. at 34-35 (Tr. at 19:24-20:8 (Therien testimony)) (stating that site development plan was submitted to DEM's Wetlands Division for review based on "what the requirements are from the septic system design as well as what the typical requirements are for wetland setbacks, and to make sure that the wetlands are not infringed upon any[ ]more than is absolutely necessary").

Based on his first-hand knowledge of those issues and their effects, Therien—a professional surveyor and site designer—offered his "professional opinion[ ] that the location of the house is the best location to develop this particular piece of property, to minimize the amount of disturbance and to meet all of the wetland's [*sic*], as well as the septic system design, requirements." R. at 36 (Tr. 21:6-12); *see* R. at 32-33 (Tr. 17:17-18:7) (addressing Therien's qualifications as an expert witness); R. at 36 (Tr. 21:13-24) (confirming that Therien's opinions are based on review of Muscatelli's plans and physical observations of the Property).

Rabideau, a "wetland scientist" was retained by Applicants for wetland delineation and to assist with the DEM wetlands permit. (R. at 40-41 (Tr. 25:5-26:2).) Rabideau testified on the scope and rigor of the permit application process. (R. at 41 (Tr. 26:3-5)) (describing DEM permit obtained by Applicants on an "application to alter freshwater wetlands" as a "detailed permit" and the "highest level of review that anyone can go through, … the Freshwater Wetland's [*sic*] Program at DEM). Rabideau testified that, "even though this was an application to alter, [it] was not considered an undesirable alteration to the freshwater wetlands, so we were able to satisfy … that … [the Applicants' proposed location] was . . . the most reasonable alternative for development of the lot under the Freshwater Wetland Program rules." (R. at 43 (Tr. 28:9-17).)

Significantly, both Therien and Rabideau also testified that Applicants had revised their proposed design to move the house further from Appellants' boundary line while still complying with the constraints of the wetlands permit that DEM had issued for the original design. R. at 35 (Tr. 20:8-22 (Therien testimony)); R. at 44 (Tr. 29:15-17 (Rabideau testimony)) (stating that relocation needed to stay "within an approved limit of disturbance" in order to receive DEM approval as a permit modification). Michael Barnes testified that this relocation was done to "be good neighbors" and in direct response to the Appellants' concerns regarding the house's proximity to the boundary line. R. at 54-55 (Tr. 39:23-40:2); *see* R. at 54 (Tr. 39:8-13) ("[W]e did recontract with Mr. Muscatelli and Mr. Rabideau to try to reposition the home, and we were able to . . . change the shape and location and the house was moved from 12 feet from the property line to 18 feet from the property line[.]"); *cf. New Castle*, 248 A.3d at 648 (upholding trial justice's decision to uphold board's denial of dimensional variance in part due to applicant's unwillingness to consider reducing size of proposed house or moving it farther away from wetlands).

All of the above testimony, which by this Court's measure certainly amounts to "more than a scintilla" of competent evidence, was directly relevant to the question of whether Applicants' requested relief was the least relief necessary. *New Castle*, 248 A.3d at 643 (quoting *Iadevaia*, 80 A.3d at 870); *see* R. at 98 (finding that the Applicants had "reconfigured the footprint to a location that was six feet further away from the property line, resulting in a request to lower the amount of relief required"). Also relevant to the Court's inquiry on appeal is the Zoning Board's determination that the testimony of Applicants' expert witnesses "was credible and unrebutted by any expert testimony proffered by" Appellants. (R. at 97); *see, e.g.*, R. at 36 (Tr. 21:6-9) (Therien testimony) ("[I]t's my professional opinion, that the location of the house is the best location to develop this particular piece of property[.]"); R. at 49 (Tr. 34:17-22 (Sweeney testimony)) ("In my

opinion, it's a consistent and complementary use to other single family properties in the area. It's a well designed project, and I believe it will be consistent and will have no negative impact on surrounding property values."). It is well settled that "if expert testimony before a zoning board is competent, uncontradicted, and unimpeached, it would be an abuse of discretion for a zoning board to reject such testimony." *Murphy v. Zoning Board of Review of Town of South Kingstown*, 959 A.2d 535, 542 (R.I. 2008). Muscatelli, Therien, Sweeney, and Rabideau all testified as experts in their respective fields. As such, the Zoning Board would have *abused* its discretion had it ignored their unrebutted testimony.

The Court finds that the record contains substantial evidence in support of the Zoning Board's finding that Applicants' "relief requested is the least relief necessary and if the variance[s] [were] not granted, denial would amount to more than a mere inconvenience." (R. at 98.) The Zoning Board correctly referenced the statutory standard for a dimensional variance set out in § 45-24-41(e)(2). *Id.*; *see* § 45-24-41(e)(2) (requiring that "evidence [be] entered into the record of the proceedings showing . . . that the hardship suffered by the owner of the subject property if the dimensional variance is not granted amounts to more than a mere inconvenience"). In addition, our Supreme Court has stated that the mere inconvenience test "must be applied reasonably and realistically." *Travers v. Zoning Board of Review of Town of Bristol*, 101 R.I. 510, 514, 225 A.2d 222, 224 (1967); *see Alpert v. Middletown Zoning Board of Review, No.* NC-2003-0436, 2004 WL 1542238, at *5 (R.I. Super. June 28, 2004) (quoting *Travers*).

From 1991 to 2002, the Zoning Enabling Act required applicants to "satisfy the zoning board 'that the hardship suffered by the owner of the subject property if the dimensional variance is not granted amounts to more than a mere inconvenience, which means that *there is no other reasonable alternative to enjoy a legally permitted beneficial use of one's property*.'" *Sciacca v.*

Caruso, 769 A.2d 578, 583 (R.I. 2001). In *Sciacca*, our Supreme Court described this language as a "new statutory burden of proof" that "effectively sounded the death knell for the old *Viti* doctrine that had allowed a property owner to obtain a dimensional variance simply by demonstrating an adverse impact amounting to more than a mere inconvenience." *Id.* (citing *Viti v. Zoning Board of Review of City of Providence*, 92 R.I. 59, 64-65, 166 A.2d 211, 213 (1960)).

In 2002, the General Assembly amended the zoning enabling act to require applicants "to demonstrate only 'that the hardship [the applicant would suffer] if the dimensional variance is not granted amounts to more than a mere inconvenience.'" *Lischio*, 818 A.2d at 691 (quoting § 45-24-41(d)(2) (current version at § 45-24-41(e)(2))). In *Lischio*, the Rhode Island Supreme Court held that "the revised language in the 2002 amendment" effectively "reinstate[d] the judicially created *Viti* Doctrine" by "lessen[ing] the burden of proof necessary to obtain dimensional relief" to a showing "that the effect of denying dimensional relief amounts to more than a mere inconvenience." *Id.* at 691-92.

As our Supreme Court pointed out in *New Castle*, however, "the requirement for an applicant requesting a dimensional variance to prove 'that there is no other reasonable alternative way to enjoy a legally permitted beneficial use of the subject property' remains codified in § 45-24-31(66)(ii)[,]" which is the section of the Zoning Enabling Act that defines the words and terms used therein. *New Castle*, 248 A.3d at 647 n.5; *see* § 45-24-31. Although the Zoning Board Decision does not contain an explicit finding "that there [was] no other reasonable alternative way" for Applicants "to enjoy a legally permitted beneficial use of" the Property, the Court does not view this as a reversible error of law on the part of the Zoning Board for several reasons. Section 45-24-31(66)(ii).

First, it is unclear if the Supreme Court's references to § 45-24-31(66)(ii) in *New Castle* were meant to signal a retreat from its explicit statements in *Lischio* "that the revised language in the 2002 amendment lessens the burden of proof necessary to obtain dimensional relief and an applicant need show only that the effect of denying dimensional relief amounts to more than a mere inconvenience." *Lischio*, 818 A.2d at 692; *cf. New Castle*, 248 A.3d at 647 n.5 (acknowledging that Supreme Court's "holding in *Bernuth v. Zoning Board of Review of Town of New Shoreham*, 770 A.2d 396 (R.I. 2001), seems to quote a since-revised version of § 45-24-41" but quoting it because the language defining the "requirement for an applicant requesting a dimensional variance to prove 'that there is no other reasonable alternative way to enjoy a legally permitted beneficial use of the subject property' remains codified in § 45-24-31(66)(ii)").

In the context of *New Castle*, while the Supreme Court did state that "[t]he burden is upon the applicant to show 'that there is no other reasonable alternative way to enjoy a legally permitted beneficial use of the subject property[,]'" it did so in support of its finding "that the trial justice's ruling that New Castle's requested relief does not reflect the least relief necessary is supported by substantial evidence." *New Castle*, 248 A.3d at 648-49 (quoting § 45-24-31(66)(ii)). The apparent tension between *New Castle* and *Lischio* is also relieved somewhat by the fact that some earlier cases applied the *Viti* doctrine in a manner that resembles the "no other reasonable alternative way to enjoy a legally permitted beneficial use" language of § 45-24-31(66)(ii). *See, e.g., DiDonato v. Zoning Board of Review of Town of Johnston*, 104 R.I. 158, 164, 242 A.2d 416, 420 (1968) (quoting *H. J. Bernard Realty Co. v. Zoning Board of Review of Town of Coventry*, 96 R.I. 390, 394, 192 A.2d 8, 11 (1963)) (defining "'more than mere inconvenience' to mean that an applicant must show that the relief he is seeking is reasonably necessary for the full enjoyment of his permitted use"); *see also* Roland F. Chase, *Rhode Island Zoning Handbook* § 177 at 173 & n.292

(3d ed. 2016) (citations omitted) (discussing pre-1991 cases interpreting "'reasonably necessary for the full enjoyment of a permitted use'" standard as synonymous with "'more than a mere inconvenience'" standard).

Second, even if the Supreme Court's judicial gloss on §§ 45-24-41(e)(2) and 45-24-31(66)(ii)) in *New Castle* was intended to heighten the burden of proof for dimensional variances, *New Castle* post-dated the Zoning Board's Decision; at the time, *Lischio* was our Supreme Court's last word on the issue. *Compare O'Reilly v. Town of Glocester*, 621 A.2d 697, 704-05 (R.I. 1993) (citing *Rekowski v. Cucca*, 542 A.2d 664, 666 (R.I. 1988)) ("Under Rhode Island law if the General Assembly changes the law while a case is pending appeal, the law in effect at the time of the appeal controls the case.") *with Rivera v. Employees' Retirement System of Rhode Island*, 70 A.3d 905, 913 (R.I. 2013) (citing *Bayview Towing, Inc. v. Stevenson*, 676 A.2d 325, 328 (R.I. 1996)) (applying equitable tolling doctrine to allow petitioner's untimely appeal from final agency decision, in part due to the fact that a previous Supreme Court decision "expressly stated that the thirty-day period is triggered by the receipt of the final agency decision—a statement that has never been abrogated by this Court until today").

Third, and most importantly, the Applicants submitted sufficient evidence to satisfy either standard. *Cf. Lischio*, 818 A.2d at 692 ("[W]e conclude that a variance for lot No. 20 not only satisfies the more relaxed *Viti* standard for a dimensional variance, but that the [applicants] also satisfied the more stringent test set forth in the statute as originally written."). Even though the Zoning Board did not explicitly state that Applicants had "no other reasonable alternative way to enjoy a legally permitted beneficial use of the subject property[,]" that finding is well-supported by substantial evidence in the record. Section 45-24-31(66)(ii); *cf. New Castle*, 248 A.3d at 641-42, 644 (disapproving of zoning board's procedure of notifying applicant of its denial through a

letter "contain[ing] a list of each member's vote along with the individual reasoning for each member's vote" but agreeing with trial justice, who "cull[ed]" specific findings of fact addressing each element of the dimensional variance standard from the record, "that the record in this case contains minimally sufficient findings to enable judicial review").

In addition to the findings that the Applicants' requested relief was the least relief necessary and that the Alternative Footprint was "not a viable alternative[,]" the Zoning Board's Decision adverted to specific testimony regarding Applicants' difficulties with siting the proposed house on the Property and receiving DEM wetlands approval, the fact that the proposed house was then moved to maximize the clearance from the boundary line, and the near-impossibility of siting the house at the front of the Property instead. *See* R. at 97-99. As a result, to the extent that Applicants' "'burden before the zoning board"' was to "'show[ ] that a factual basis appears in the record to support the proposition that there is 'no other reasonable alternative' that would allow the applicant to enjoy a legally permitted beneficial use of the property[,]'" the Court finds that they satisfied that burden. *New Castle*, 248 A.3d at 647 (quoting *Bernuth*, 770 A.2d at 401).

Against such evidence, Appellants contend that Applicants' approved design *cannot* represent the least relief necessary because the Alternative Footprint, which appears in the record in the form of a footprint diagram bearing the legend "Alternate Plan (needs no relief)[,]" indicates that Applicants could have built a different single-family house on the Property without the need for any dimensional relief. (Pls.' Mem. 5); *see* R. at 1; (R. at 58 (Tr. 43:3-7).) Appellants assert that the Zoning Board's contrary finding on the least relief necessary element was therefore clearly erroneous, and that the Zoning Board's decision not to question Applicants and their expert witnesses on the viability of the Alternative Footprint was an abuse of discretion that impermissibly shifted the burden of proof away from the Applicants. *See* Pls.' Mem. 6-9.

For their part, Applicants argue that the Alternative Footprint advanced by Appellants is not competent evidence because "it is a polygon with associated dimensions" that contains no "information that ties it to the Property." (Applicants' Mem. 12.) While the Alternative Footprint does appear in the record in such a form, other documents in the record do connect that design to the Property; for example, the Alternative Footprint appears on a detailed site plan which bears the stamp of Muscatelli, Applicants' land surveyor and expert witness. *See* R. at 1; R. at 171. These documents appear to indicate that the Alternative Footprint was, at some point, under consideration as an alternative design in the same general area of the Property as the final design.[9]

Crucially, however, the documents also indicate that—in addition to presenting a different size and shape from the final design—the Alternative Footprint would cover a slightly different portion of the Property. *See* R. at 1; R. at 171. As a result, while these documents place the Alternative Footprint farther away from Appellants' boundary line, they also place it closer to the ledges and wetlands that form the Property's main impediments both to obtaining DEM approval for any particular design and to building on the Property more generally. *See, e.g.*, R. at 27 (Tr. 12:17-13:7) (Muscatelli testimony). The Zoning Board acknowledged this issue, finding that "there was nothing presented that this older plan was ever submitted to DEM for septic system or wetlands approval" and that the "absence of such approvals with respect to the required permitting leads the Board to find that" the Alternative Footprint "is not a viable alternative to the current proposal." (R. at 99.) Although DEM wetlands approval is a separate process from the variance analysis, Applicants' need to obtain and retain that approval in order to build a single-family home

[9] The Court notes that these documents also reveal that even the Alternative Footprint, as sited, would require dimensional relief from the rear-yard setback requirements. Appellants have essentially advanced no arguments challenging that aspect of the Zoning Board's Decision. *See* R. at 1; *see also* R. at 171.

on the Property represents a constraint on their ability to enjoy a legally permitted use that is ultimately "due to the unique characteristics of the subject land" and thus relevant to the Zoning Board's inquiry. Section 45-24-41(d)(1); *cf. New Castle*, 248 A.3d at 644-46 (recognizing distinct functions of DEM and zoning board approvals but stating that "an applicant for zoning relief ought to be able to rely on permits granted by DEM with respect to those matters uniquely within DEM's expertise").

The Zoning Board was also entitled to consider the facial shortcomings of the Alternative Footprint, "a very odd shaped footprint with an illogical design" tapering from a twenty-six foot width at one end of the structure to an eight foot width at the other, as the consequent loss of square footage and usable space was readily apparent. (R. at 99.); *see Giron v. Bailey*, 985 A.2d 1003, 1010 (R.I. 2009) (quoting *Allen v. State*, 420 A.2d 70, 72-73 (R.I. 1980)) (stating that expert testimony is not necessary if the factfinder "is as capable of comprehending and understanding [the] facts and drawing correct conclusions from them as is the expert"); *see also Pawtucket Transfer Operations, LLC*, 944 A.2d at 859 (quoting *Monforte*, 93 R.I. at 449, 176 A.2d at 728) ("'[A] zoning board of review is presumed to have knowledge concerning those matters which are related to an effective administration of the zoning ordinance.'"). This language from the Zoning Board Decision supports their viewing the Alternative Footprint as being unreasonable. (R. at 99.) Thus, even if the Court looked at the record through the lens of the more stringent test of "'no other reasonable alternative' that would allow the applicant to enjoy a legally permitted beneficial use of the property[,]'" the record supports that Applicants satisfied that burden. *New Castle*, 248 A.3d at 647 (quoting *Bernuth*, 770 A.2d at 401).

As a result, the Court cannot agree with Appellants' characterization of the Alternative Footprint as a smoking gun that reveals that the Zoning Board's least relief necessary finding was

"[c]learly erroneous in view of the reliable, probative, and substantial evidence of the whole record[.]" Section 45-24-69(d)(5). Instead, the Alternative Footprint was simply one piece of evidence, with relative strengths and weaknesses, that the Zoning Board was entitled to weigh and reject in favor of Appellants' evidence. *See Lloyd*, 62 A.3d at 1089 ("In this case, the zoning board accepted the testimony of the respondents' expert witness, a decision that was within the board's discretion."). Contrary to Appellants' assertion that the Zoning Board "failed to review or consider [the] alternat[ive] footprint in any meaningful manner[,]" that is just what occurred. (Pls.' Mem. 9.) If "it cannot be said after a review of the conflicting evidence that the [zoning] board's findings were clearly erroneous[,]" the Court cannot disturb those findings. *Mendonsa v. Corey*, 495 A.2d 257, 263 (R.I. 1985); *see Lloyd*, 62 A.3d at 1083.

Similarly, there is no merit to Appellants' contention that the Zoning Board improperly shifted the burden of proof in the variance inquiry away from the Applicants. *See* Pls.' Mem. 6-7. In support of its finding that the "relief requested is the least relief necessary and if the variance[s] [were] not granted, denial would amount to more than a mere inconvenience[,]" the Zoning Board first accepted and discussed the "credible" expert testimony of Rabideau, Therien, and Muscatelli regarding the physical constraints on the Property and the Applicants' "effort[s] to lessen the amount of relief requested" by moving their proposed design six feet away from the boundary line. (R. at 98-99.) Having outlined the substantial evidence put forth by the Appellants, the Zoning Board then addressed the Alternative Footprint; however, for the reasons this Court has previously stated, the Zoning Board concluded that the Alternative Footprint was "not a viable alternative" to Applicants' proposal and declined to afford it dispositive weight. (R. at 99.) As such, the Zoning Board did not excuse Applicants from their evidentiary burden, but instead made "'an informed

and record-supported decision'" that the burden had been satisfied. *Lloyd*, 62 A.3d at 1089 (quoting and affirming trial justice's decision affirming zoning board's decision).

Finally, Appellants also take issue with the Zoning Board's decision not to question Applicants' expert witnesses about the Alternative Footprint. *See* Pls.' Mem. 9. At the hearing, after bringing the Alternative Footprint to the Zoning Board's attention and expressing his respect for Applicants' expert witnesses, Appellants' counsel stated:

> "I would suggest to the Chair, that the experts be posed the question, and that is, would any of their expert opinions change, if the alternate footprint design that needed no dimensional relief were used in lieu of the footprint that is being put forth this evening. And I would submit to the Board, that if the answer to that is that there would be no change in their expert opinions, that, in fact, what is before the Board this evening is not the least relief that is necessary, and rather the earlier design, what I refer to as the alternate footprint design is something that is more in keeping with the statutory and ordinance requirements for relief." (R. at 59 (Tr. 44:1-24).)

Appellants' counsel then moved on to question Bethany Bomar; however, the Zoning Board chose not to recall Applicants' experts and pose them the suggested question. *See* R. at 59-60 (Tr. 44:24-45:5). Ultimately, the Zoning Board concluded that the Alternative Footprint, with its attendant flaws, could not overcome the weight of Applicants' contrary evidence. *See* R. at 98-99.

On appeal, Appellants have provided no binding or persuasive authority for the proposition that the Zoning Board necessarily erred when it declined to take Appellants' counsel up on his invitation to reexamine Applicants' experts on the topic of the Alternative Footprint. *See* Pls.' Mem. 9-10. "[I]n zoning matters, a reviewing board is not required to comply strictly with the rules of evidence[;] . . . [a]s long as the board affords a fair and impartial hearing to both parties, considerable latitude with respect to these matters is allowed." *Caswell v. George Sherman Sand & Gravel Co. Inc.*, 424 A.2d 646, 648 n.4 (R.I. 1981) (citations omitted). Although our Supreme Court has "[s]uggest[ed] that cross-examination be permitted in appropriate [zoning] cases[,]" it

has been clear that due process does not require it. *Westminster Corp.,* 103 R.I. at 394, 238 A.2d at 360-361. Appellants' counsel did not request that he be allowed to take the initiative and examine Applicants' experts about the Alternative Footprint himself, and Appellants have not argued on appeal that he was prevented from doing so; nevertheless, under present case law, zoning boards are not required to allow adversaries a chance to cross-examine witnesses. *Id.*; *see* R. at 59 (Tr. 44:9-45:1).

Moreover, it is unclear how this Court could assign reversible error to the Zoning Board's decision not to reexamine Applicants' experts about the Alternative Footprint without impermissibly "substitut[ing] its judgment for that of the zoning board of review as to the weight of the evidence on questions of fact." Section 45-24-69(d). The record shows that the Alternative Footprint was submitted by Appellants' counsel prior to the hearing and was thus part of the record before the Zoning Board at the hearing. *See* R. at 57-58 (Tr. 42:19-43:7). In addition, the Alternative Footprint was just one of several Muscatelli maps containing alternative footprints that were submitted as part of the record. *See* R. at 169-171; 182. At several points during the experts' testimony, members of the Zoning Board did pose questions regarding the Applicants' proposed design. *See, e.g.*, R. at 30 (Tr. 15:5-8) (question from Board Member Ed Crawley to Muscatelli regarding "how close the proposed house is to the existing well that is on the diagram of the adjoining property"). Several of Applicants' experts were involved in both the original siting decision and the decision to adjust the proposed design; thus, while they did not explicitly testify that the Alternative Footprint was not a viable option, the Zoning Board could reasonably draw that inference from the experts' proffered opinions that "the location of the house is the best location to develop this particular piece of property" and that the proposed design was "the most

reasonable alternative for development of the lot under the [DEM] Freshwater Wetland Program rules." (R. at 36 (Tr. 21:7-12 (Therien testimony)); (R. at 43 (Tr. 28:15-17 (Rabideau testimony)).)

As a result, and given the Zoning Board's recognition of the Alternative Footprint's inherent deficiencies as a "very odd shaped footprint with an illogical design[,]" the Court can only conclude that the Zoning Board made a justifiable determination that questioning Applicants' experts about the Alternative Footprint was unnecessary. (R. at 99.) An abuse of discretion "'occurs when a material factor deserving significant weight is ignored, when an improper factor is relied upon, or when all proper and no improper factors are assessed, but the [decision maker] makes a serious mistake in weighing them.'" *Hogan v. McAndrew*, 131 A.3d 717, 722 (R.I. 2016) (quoting *Independent Oil and Chemical Workers of Quincy, Inc. v. Procter & Gamble Manufacturing Co.*, 864 F.2d 927, 929 (1st Cir. 1988)); *see Selwyn v. Ward*, 879 A.2d 882, 887 (R.I. 2005) (quoting *Geloso v. Kenny*, 812 A.2d 814, 817 (R.I. 2002)) ("A review for abuse of discretion requires us to examine the ruling to ensure that the trial justice's discretion 'has been soundly and judicially exercised, . . . with just regard to what is right and equitable under the circumstances and the law.'"). Appellants' contentions that the Zoning Board committed any such indiscretion are not persuasive, and the Court declines to dissect the Zoning Board's decision-making process any further.

IV

Conclusion

For the reasons stated above, the Court finds that substantial evidence supports the Zoning Board's Decision. Accordingly, Appellants' appeal is denied, and the Decision of the Zoning Board is affirmed. Appellants' request for a stay under Count II of their Complaint is also denied. Counsel shall submit the appropriate order and judgment for entry.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	**Bomar, et al. v. The Glocester Zoning Board of Review, et al.**
CASE NO:	**PC-2020-07835**
COURT:	**Providence County Superior Court**
DATE DECISION FILED:	**October 6, 2022**
JUSTICE/MAGISTRATE:	**Rekas Sloan, J.**
ATTORNEYS:	
For Plaintiff:	**David M. D'Agostino, Esq.**
For Defendant:	**Carol L. Ricker, Esq.** **William l. Bernstein, Esq.**